driving licence the Magistrate is bound by law to do so and to fail to do so is a presumptuous neglect of his duty imposed upon him by Parliament.

In my view the learned Magistrate has seriously misdirected himself on what he should take into consideration when assessing sentences for offences of this nature. The conviction of the accused is upheld. The sentence of fine, however, is quashed and any payment made in respect thereof must be returned to the accused and in substitution therefor the accused is sentenced to three months' imprisonment, the period of disqualification is increased to two years and the particulars of the conviction must be endorsed on the defendant's driving licence.

Order accordingly.

LIM KONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Adams J.) January 13, 1962]

[J.B. — Criminal Appeal No. 32 of 1961]

Criminal Law and Procedure — Penal Code, s.387 — Extortion — Putting person in fear of injury.

Evidence Ordinance, 1950, ss.8, 54 and 57 — Admissibility — Whether evidence of financial embarrassment is evidence of bad character — Hearsay — Judicial Notice.

Criminal Procedure Code (Cap. 6), s.407 — Confiscation of car — Whether justified.

The appellant was convicted on an amended charge under section 387 of the Penal Code of writing certain letters threatening to kill one Teng Wah Fook unless $14,000 ransom money was paid over by the mother of the said Teng Wah Fook and sentenced to 3 years' imprisonment. The learned President also ordered that the car in which he was arrested to be confiscated. On appeal, it was argued *inter alia*: (i) evidence introduced by the prosecution to show that the accused was in a state of financial embarrassment was purely evidence of bad character and therefore inadmissible under section 54 of the Evidence Ordinance. (ii) the learned President should not have called upon the defence because the evidence negatived the fundamental elements of the charge, namely that the appellant was the person who put the complainant in fear of death or injury, (iii) the learned President failed to direct his mind to whether a certain letter (exhibit P3) was written by the appellant and whether it put the complainant in fear, and (iv) there was no justification for the confiscation of the accused's motor car.

Held: (1) the fact that a person is unable for the moment to satisfy his creditors is not evidence of criminal or grave moral misconduct and as such the evidence was admissible and did not prejudice the fairness of the trial;

(2) from the evidence the learned President's conclusion that the complainant was put in fear was a fair one;

(3) there was ample evidence to show how and why the learned President found that the complainant had been put in fear;

(4) there was no justification for the confiscation of the accused's motor car under the provisions of section 407 of the Criminal Procedure Code as it was not used for the commission of the offence, but merely to collect the ransom money.

Cases referred to:—

(1) *Loke Soo Har* v. *Public Prosecutor* [1954] M.L.J. 149.
(2) *Balasingham* v. *Public Prosecutor* [1959] M.L.J. 193.
(3) *R.* v. *Bartlett* [1959] Cr. L.R. 285.
(4) *Austin's Case* [1958] Cr. Cases and Comment 93.
(5) *Rodley's Case* 9 Cr. App. R. 69.
(6) *Morrissey's Case* 23 Cr. App. R. 189.
(7) *Taylor's Case* 25 Cr. App. R. 46.
(8) *Palmer's Case* 25 Cr. App. R. 97.
(9) *Lee Lip Ngee* v. *Crown Counsel* [1947] M.L.J. 68.

CRIMINAL APPEAL.

David Marshall for the appellant.

Hamzah bin Dato A. Samah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Adams J.: This is an appeal by Lim Kong who was convicted by the learned President of the Sessions Court sitting at Johore Bahru on the 9th August, 1961, on an amended charge in that he between the 11th and 13th February, 1961, at Jemaluang in the Police District of Mersing, in the State of Johore, in order to the committing of extortion put Wong Ah Kam in fear of death of her son, Teng Wah Fook by threatening that he would kill Teng Wah Fook unless the said Wong Ah Kam paid him $14,000 ransom money, and that he thereby committed an offence punishable under section 387 of the Penal Code. The appellant was sentenced to three years' imprisonment, and the car in which he was arrested was ordered to be confiscated.

There were eight grounds of appeal. The first of these, which was subsequently abandoned by Mr. Marshall, was in effect that there was no jurisdiction for the learned President to transfer the case from the Mersing Sessions Court to the Sessions Court sitting at Johore Bahru. In view of the fact that Mr. Marshall abandoned this it is not necessary to say anything more than that the jurisdiction of a Sessions Court is Federation wide [Courts Ordinance, 1948, section 59(2)] and section 104 gives a president or magistrate power to transfer any case or matter to any other Sessions Court in the interests of justice. Although Mr. Marshall underlined the words "interests of justice" and said that the learned President should have exercised his discretion judicially it clearly was in the interests of justice that this case be transferred from Mersing to Johore Bahru for the convenience of the learned President, counsel and the court generally and in order that the trial could continue in a place where the necessary legal authorities were readily available.

The second ground of appeal was the admission of the first two extortion letters P1 and P2 and of the evidence of P.W. 11, Kan Chow, and P.W. 12, Tan Oon Cheng. Evidence concerning Exhibits P1 and P2 had to be given as the documents examiner had examined them and in fact that evidence was favourable to the accused, namely that he did not write the first two extortion letters. The evidence as to what happened on previous ambushes was in the main the result of cross-examination by counsel for the defence and I do not think that that evidence was either inadmissible or prejudicial to the

accused. It is clear that everyone knew of the failure of the two previous ambushes which goes to show that the accused might well have known of the two previous attempts and this might well be held to support his evidence that it was a case of curiosity that took him to the 11th mile. Kan Chow deposed that the accused had an outstanding debt for petrol supplied since 1959 of some $1,200. Tan Oon Cheng gave evidence that the accused had borrowed $4,000 to replace a diesel engine in SR 6959 and that he was in arrears of his instalments in January and February. Mr. Marshall also referred to cross-examination of the accused along similar lines. It was not disputed and in fact is shown on the record that this evidence and cross-examination were introduced to show that the accused was in a state of financial embarrassment and the learned Deputy pointed out in his reply to Mr. Marshall that this evidence was admissible under section 8 of the Evidence Ordinance, 1950 to prove motive. Mr. Marshall argued, however, that it was purely evidence of bad character and was therefore inadmissible by virtue of section 54 of the Evidence Ordinance. With respect to Mr. Marshall I do not think that evidence of financial embarrassment is necessarily evidence of bad character within the meaning of section 54. Furthermore, the evidence of financial instability supported equally the case for the defence as evidence of motive for the prosecution. Where a crime is financial, as this one is in part, evidence that the accused was being pressed to find money to satisfy his debts is relevant as tending to show a possible motive. I do not consider that the fact that a man is financially embarrassed is necessarily any stigma upon him, and one can distinguish the cases cited by Mr. Marshall from the evidence led in the present case in that the evidence objected to in those cases related to the commission of a criminal offence, or to conduct of grave moral turpitude. In the case of *Loke Soo Har* v. *Public Prosecutor* [1] evidence came out that the accused was a notorious pickpocket. In the case of *Balasingham* v. *Public Prosecutor* [2] the evidence was that the accused "caused trouble to others". In the case of *R.* v. *Bartlett* [3] where the accused was charged with indecent assault evidence was given that an obscene photograph was found in his possession at the time of his arrest. In *Austin's* case [4] on a charge of stealing, evidence was given that the accused had falsified an income tax return and had been convicted. In *Rodley's* case [5] evidence of immoral conduct subsequent to the commission of housebreaking with intent to rape was held to be inadmissible. In *Morrissey's* case [6] questions were asked tending to establish that the accused had previously robbed church money boxes. In *Taylor's* case [7] as a result of questions by the Judge it was necessary to disclose previous convictions by defence counsel. Here the conviction was quashed. In *Palmer's* case [8] the jury about to try the prisoner happened to overhear counsel in the previous case referring to his client as the son of a notorious shoplifter, who was the accused to be tried by that jury. In all those cases it will be seen that the evidence led showed that the prisoner either had been previously convicted or was guilty of some grave moral misconduct. The fact that a person was unable for the moment to satisfy his creditors is not evidence of either criminal or grave moral misconduct. The test seems to be: "Does the evidence sought to be led preclude a fair trial?" or, as Mr. Marshall himself put it, "The whole trend is that justice should be done according to the law, and the court will go to all lengths to see to it that the accused has a fair trial". The evidence of witnesses and the cross-examination of the accused was in my opinion admissible and did not prejudice the fairness of the trial.

Mr. Marshall then said he would argue the third, fourth and fifth grounds in one. Ground 3 complained that the learned President should not have called upon the defence because the evidence negatived two fundamental elements of the charge, namely that (i) the complainant was put in fear of the death of her son and (ii) that the appellant was the person who so put her in fear.

The evidence of the handwriting expert established that the person who wrote the third extortion letter P3 did not write the first two extortion letters. He went on to say that the person who wrote the letters found in the accused's house with his name on them — exhibit P4 — could possibly have written the third extortion letter — P3 — but he pointed out that there were three characters dissimilar and his cross-examination made it clear that it was only a possibility and there was no established specimen of accused's handwriting against which P3 had been checked. The evidence of the accused's son (P.W. 2) was unsatisfactory and this fact the learned President accepted in his grounds of decision but at the close of the case for the prosecution there was the evidence that the complainant had received the ransom letter P3 which had caused her to burst into tears and to instruct her son-in-law who discussed the letter P3 with her to write a letter asking for a reduction of the ransom money. I think the conclusion which the President drew from that evidence, namely that she had been put in fear is a fair one. Secondly, there is the evidence that the handwriting in P3 could possibly be that of the accused and that the writing paper on which letters bearing his name were written and envelopes found in the accused's house are similar to those used for the extortion letter, even though they are in common use. There is also evidence to establish that the accused had access to writing paper and envelopes similar to those used in exhibit P3 the extortion letter and its envelope P5. There is also the writing in the letters exhibit P4 similar to that of the extortion letter except in respect to three characters. Thirdly, the accused in fact complied with the procedure outlined in the extortion letter and

appeared at the place where the money was to be deposited at about the time it was due to be deposited. There was, therefore, in my opinion, as the learned President found, a *prima facie* case for the accused to explain.

Ground 4 was that the learned President misconceived the evidence of D.W. 3, Leong Siew Wai. D.W. 3 testified that he had heard rumours that the complainant had sent someone to put thousands of dollars at the 11th milestone. He also deposed that he himself had seen P.W. 19 — Tan Lam Kim, the complainant's son-in-law driving complainant's motor car and later he heard that the car had been driven to the 11th milestone to place the money there. These rumours he passed on to the accused. The learned President deals with this in his grounds of decision as follows:—

"Most of D.W. 3's evidence is hearsay and should not therefore be given great weight. It would not still be probable for the accused to stop at the milestone just out of curiosity under the surrounding circumstances as explained earlier."

Mr. Marshall complained that the learned President misdirected himself on the question of hearsay. Of course this was hearsay — it was a rumour, but Mr. Marshall complained that the learned President should have asked himself whether or not it was consistent with the truth that the accused might not out of curiosity, or because he was financially embarrassed, as the prosecution had so kindly proved, gone to the 11th milestone to help himself to the thousands of dollars that was rumoured to be lying there. Reprehensible as this might be it would not be the offence for which the accused stands charged. But the learned President had already dealt at great length and with particular care why he could not accept the accused's explanation. He may have been wrong in considering D.W. 3's evidence but he has quite clearly said that, in effect, even if he did tell the accused this, he still does not think it probable for reasons which he has already given, that the accused would go to the 11th mile out of curiosity. The learned President gave reasons for this and drew a conclusion that the accused would not have gone to that spot at that time unless he well knew and had been privy to the contents of exhibit P3. Mr. Marshall also objected to the President drawing on his own knowledge concerning fresh elephant droppings and the prevalence of wild boar and deer on this stretch of road. A President in the course of his duties is bound to travel up and down the length and breadth of his circuit and he obviously cannot keep his eyes shut. As Evans J. said in *Lee Lip Ngee* v. *Crown Counsel*: (9)

"Section 57(i) of the Evidence Enactment does not contain an exhaustive list of matters subject to judicial notice, and sub-section (2) thereof gives the Court a wide power of judicially informing itself, which was in practice been widely used. I feel no doubt that a port's tide tables worked out and published for general information might quite properly be consulted. So too the judge might be expected to have a general knowledge of the navigation of a port in his area just as he would be expected to have a general knowledge of the means of communication."

The President who travels this road frequently can use the general information of his own eyes of the physical features of an area well known to him for general purposes. There is evidence on the record that the road between the 9th milestone to Jemaluang is uninhabited and also that it was jungle. That in itself was decisive without the elephant droppings and wild boar and justified the learned President in his finding that neither could he believe the accused nor find that his version is consistent with the truth, because no honest person and no person who was not directly concerned with extorting money from complainant would go to such a spot at such a time and put himself in a position —

(a) where he might be arrested by the police (as he eventually was), or

(b) attacked by the desperate criminals who were attempting to extort the money from the complainant, or

(c) be eaten, attacked or injured by wild animals, or

(d) be seen by the complainant and/or her family and identified, or

(e) suffer a combination of all or some of the above.

The fifth ground of appeal was that the learned President failed to direct his mind to whether complainant was put in fear by the letter exhibit P3 and failed to make a finding as to whether the accused wrote the letter. With respect to Mr. Marshall there is ample evidence to show how and why the learned President found that the complainant had been put in fear and there is no need to repeat that there was no need for the learned President to make a definite finding that the accused wrote the letter. His judgment is based on a finding that the accused well knew what was in the letter and his judgment indicates that he viewed the evidence as a whole and his inference was either the accused wrote the letter or caused it to be written and sent. He has accepted that the complainant burst into tears on its receipt; there is evidence that she discussed the letter with her son-in-law and decided to ask for a reduction in the ransom money. She must have known the contents of the letter, and the only inference from her tears and the terms of the letter was that she was put in fear.

The sixth ground of appeal is that the prosecution introduced prejudicial evidence relating to the continued absence of the complainant's son and caused the President to impose an excessive sentence. I do not think that this in fact prejudiced the learned President in any way and evidence that the son was missing had to be led in order to show that the complainant was in fear for the safety of her son. In so far as the sentence is concerned I will have something to say when I consider the seventh ground of appeal.

The eighth ground of appeal was there was no justification for the confiscation of the accused's motor car under the provisions of section 407 of the Criminal Procedure Code as

it was not used, on the facts in this case, for the commission of any offence. With this submission I agree. The offence here was the putting of the complainant in fear in order for the committing of extortion, and the car was used merely to collect ransom money. The learned Deputy Public Prosecutor also agreed and did not support the confiscation.

The learned President pointed out that the evidence in this case is entirely circumstantial and he said in effect that there is a complete chain of circumstantial evidence which links the accused beyond reasonable doubt with the letter exhibit P3 and establishes the offence charged. The learned President had the opportunity of seeing the witnesses and I am not prepared to disagree with him or with the inferences that he has drawn from the evidence led by the prosecution. He has given adequate reasons why he considers that the evidence given by the accused is not consistent with the truth and why he has rejected it. In addition to the factors considered by the learned President, the accused has said that he was very friendly with the complainant, and that he had taken her to hotels and other places. The letter P3 indicates a knowledge that the complainant could not read Chinese characters well. It says that the letter could be shown to her eldest daughter. It does not specifically say for what purpose. It must be for the purpose that the daughter could explain it to her. Secondly, the accused has said that the complainant has thrown him over and is now going to hotels and other places with someone else, so there is also the motive of revenge for slighted love to be considered. In my opinion the conviction of the accused was justified on the evidence before the President.

The seventh ground of appeal was against sentence. The accused was sentenced to three years' imprisonment. There is no evidence that he has been convicted of any previous offence, therefore he must be considered to be a first offender. All the learned President has to say about sentence is:—

"I am satisfied that the sentence of 3 years' imprisonment is proper and in no way excessive bearing in the mind public interest and the difficulty in detecting crimes of this nature which are on the increase during the first half of this year. A deterrent is indeed necessary."

This is really a most despicable offence and if the accused for his own gain plays with fire he must expect to be burnt. But the record should show that the learned President has taken into consideration all the factors before passing sentence. He should have considered the age of the accused, that is to say 43 years, the fact that he had not been previously convicted, the fact that he was not proved to have had anything to do with the kidnapping of the boy, the fact that the motive for the letter was slighted love and/or financial gain and any other relevant factor including the ones mentioned by the learned President. He does not appear to have done so. I am not surprised at the sentence. The accused was playing on the feelings of a Chinese widow who had lost her only son, but he should have also considered the matters set out above. Had he done so, I think he would agree that the sentence is excessive.

The appeal against conviction is dismissed. The sentence of three years' imprisonment is reduced to one of eighteen months, and the order of confiscation of the Mercedes Motor Car SR 6959 if made, as it does not appear either in the judgment of the learned President or on the face of Court Form 114, is set aside and must be returned.

Appeal dismissed. Sentence reduced.

GAN KIM BOON v. CHUA BOON LOW

[A.C.J. (Ismail Khan J.) January 17, 1962]

[Seremban — Civil Appeal No. 9 of 1961]

Employment Ordinance, 1955, ss.16 and 18 — Contract of service between rubber tapper and tapping contractor — Tapper paid at "piece rates" — Hospitalisation whether reasonable excuse for being absent from work — Wrongful dismissal — Whether respondent a monthly paid employee.

The appellant, a tapping contractor employed the respondent who was a rubber tapper in November 1960. The respondent was paid at "piece rates" — his wages being paid before the 7th of each month and his average monthly earning covering up to $80. The respondent was at liberty under his terms of service to seek other employment on the estate after 2 p.m. when his work for the day ended. On March 3, 1961 the respondent was hospitalised for a foot injury — he being only certified fit to work on the April 4, 1961. On April 2, 1961 the respondent saw the appellant and informed him that he would resume work on the April 4, 1961 whereupon he was informed that his services would not be required. He was not paid a month's wages. The respondent commenced proceedings with a complaint before the Junior Asst. Commissioner for Labour who held after an enquiry that there was wrongful dismissal and awarded the respondent one month's wages in lieu of notice. On appeal, it was contended for the appellant: (1) respondent was in breach of his contract because he had absented himself from work without leave; (2) the respondent had minimised his loss by getting other employment on the estate; (3) the Junior Asst. Commissioner for Labour erred in regarding the respondent as a monthly paid employee, when on his own admission, he was paid at "piece rates".

Held: (1) though the respondent was certainly absent from work for 3 weeks without leave, he was in hospital owing to the injury to his foot and therefore had reasonable excuse;

(2) the 2nd ground of appeal should be dismissed because there was no evidence that the respondent was offered any new job by the appellant or anyone else on his dismissal and that he was only doing work obtained by him before his dismissal for another employer which he was not precluded from undertaking by his contract of service;

(3) in view of section 18(1) of the Employment Ordinance, 1955 and the fact that the contract of service between the appellant and respondent did not specify any wage period, there is a statutory presumption that it is for a period of one month and it is not enough merely to show that the respondent was paid at "piece rates" to displace this presumption because that merely indictated the method by which his wages were to be calculated.